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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 9 of the Communications Act	)	MD Docket No. 94-19
	)	
Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year	)	

COMMENTS OF FIREWEED COMMUNICATIONS CORP.
KYES (TV), ANCHORAGE, AK.

These comments are submitted as late initial comments on the reply comment date of April 18, 1994, by Fireweed Communications Corporation ("Fireweed"), operator of KYES, Anchorage, Alaska.[1] Fireweed believes this proceeding is fatally flawed, and the deadline arbitrary and capricious. Nevertheless, we respectfully submit these comments in the hope the Commission will give full consideration to the forgoing.[2] Comment on the proposed IRFA is

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[1] These comments might have been timely filed if the FCC had been in compliance with 5 U.S.C. §609 (2) which states the Commission should cause "...the publication of General Notice of Proposed Rule making in a publication likely to be obtained by (a) small entity." Also the Commission did not comply with 5 U.S.C. §609 (3) requiring direct notification of small entities. As well, the Commission has not proposed the conduct of open conferences or public hearing required under 5 U.S.C. §609 (4). Commentator is not a hermit. We subscribe to and read Electronic Media, Broadcasting and Cable Magazine, TV Technology, Broadcast Engineering. We saw no notification, in fact not one mention of this proceeding, and were unaware of this proceeding until two days before comments were due. Lack of comment should not be ascribed to this commentators uniqueness. This writer has spoken with several local broadcasters, none of whom were aware of this proceeding. See Attachment A.

[2] Fireweed, as a small entity, does not retain FCC Counsel. Fireweed found that this proceeding was underway the evening before comments were due. Fireweed sought, but was denied a stay, so as to be given a chance to comment in a timely manner. (See <u>Emergency Request to Stay Procedural Dates</u>, submitted in this docket on April 8, 1994.

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included.

INTRODUCTION

Fireweed is a small business entity operating a small VHF television station in a small, geographically isolated market, were spectrum is not scarce.[3] If a fee were required today, Fireweed couldn't write the $5,000 check the rules propose. As a result, Fireweed would be subject to loss of operating authority. The rules, as proposed are so harsh that with out the $5,000 check, Fireweed couldn't even seek a waiver of the filing fee.

Our specific complaints with the proposed rules are;

a. The station, it's operators, and viewers can lose their first amendment rights to Freedom of Speech.

b. The station employees may become unemployed.

c. The citizens of Alaska would be denied their rights under article IV, section one, paragraph 1 of the Constitution of the United States of America.

d. The proposed fees and rules are not in full compliance with Pub. Law No. 103-66 Title IV.

e. KYES operates on a Shared Use channel, and therefore cannot be assessed the same fee assessed users of exclusive use channels.

f. The Impact of the proposed rules on small business entities is the essence of this filing. The impact was not

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[3] As commentator demonstrates, there is no barrier to creation of new TV stations in and near Anchorage, save the burden of paying FCC fees and collecting equipment to broadcast. The spectrum is wide open for dozens of new stations.

considered in the Initial Regulatory Flexibility Analysis, and these comments should be considered in the Commissions final Regulatory Flexibility Analysis.

g. The level of fees proposed for Alaska broadcasters is based on the benefit received by broadcasters in the continent of the United States, where spectrum crowding necessitates extensive Commission regulation to avoid interference. Since Alaska broadcasters do not benefit from this excessive level of regulation in their less spectrally crowded environment the FCC fees proposed in this proceeding are a "taking", in violation of the Fifth Amendment of the U.S. Constitution.

DISCUSSION

A. THE STATION, OPERATORS, AND VIEWERS ARE THREATENED WITH LOSS OF FIRST AMENDMENT RIGHTS TO FREE SPEECH.

The government should not erect barriers to free expression, unless the barriers are required to protect freedom of expression for a larger group. The idea behind Federal broadcast regulation is that the spectrum can not accommodate all who may wish to use it, and the rights of the broadcaster must be second to the rights of the public that receive the broadcast.

In rural, undeveloped, isolated areas like Alaska, economic constraints alone, not spectrum availability, limit the number of "voices" that can be heard. Any FCC fee reduces freedom of expression. A substantial fee substantially reduces freedom of expression.

B. THE FEE COULD RESULT IN LOSS OF JOBS. An automated station, retransmitting satellite program service such as home shopping or religion can operate with less than one full time employee, providing more rapid return of capital, but less local service to its broadcast viewers. The fee encourages broadcasters in economically marginal circumstances to reduce staff and use national program services.

C. <u>THE CITIZENS OF ALASKA WOULD BE DENIED THEIR RIGHTS UNDER ARTICLE IV PARAGRAPH 1 OF THE UNITED STATES CONSTITUTION.</u>

(1) Article 1 of the U.S. Constitution guarantees that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

(2) The same Fee will be shared by fewer Alaskans and thus be much higher per Alaskan than in the other 49 states.

(3) The Fee, by inhibiting construction and operation of new Alaskan stations, or by forcing the closure of some Alaskan stations, or by reducing the funds available to provide public interest programming, will reduce broadcast services to Alaskans disproportional to the other states, thereby constricting a major artery of the information highway.

(4) Most of Alaska receives no television service.[4] The inhibitory effects of the fee, without consideration of mitigating circumstances is at cross purposes with the spirit and meaning of section 47 U.S.C. §307(b) of the Communications Act, an act which re-affirms this Constitutional right.

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[4] Not only is most of Alaska "White area" (unserved by regular TV), but it also will not get the new DBS services, nor can all the domestic satellite arc be seen. The result, under the best of circumstances, an Alaskan citizen has fewer channels to choose from than those in the lower 48 states.

D. THE PROPOSED FEES AND RULES ARE NOT IN FULL COMPLIANCE WITH PUBLIC LAW NO. 103-66 TITLE IV.

Title IV of Public Law No. 103-66 provides that "The fees assessed shall...take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commissions activities." After more than four years of operation KYES owner-managers have worked without compensation or any return of capital. We question that this Licensee is a "beneficiary" of Commission activities. If the Commissions rules properly allow for factors such as service area coverage, or the Public Interest, we believe fees for KYES would be mitigated.[5]

FIREWEED'S SUGGESTED REMEDY

We respectfully suggest the rules implementing the Assessment and Collection of Regulatory Fees for the 1994 fiscal year and thereafter state that:

(a) A television applicant shall be presumed to be exempt from and will not be required to submit payment if, in lieu of payment the applicant makes suitable showing that:

1. The station is a small business entity under the terms of 15 U.S.C. §632 (a) et. seq.[6]

2. The station must meet the criteria defining a small

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[5] See NPRM page 4, paragraph 5.

[6] This portion of the act states, in part, that a small business concern "... shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.

business entity found in 13 C.F.R. §121.401.[7]

3. The station must not exceed 10% of the "annual receipts" found in 13 C.F.R. §121.601 Major Group 48.[8]

4. The stations has not made a profit in the preceding year.

5. In the prior year, Station KYES operated in the public interest, convenience and necessity within the meaning of the criteria that resulted from the inquiry into must carry.[9]

6. The station certifies the above and that payment of the fee will result in diminished service to the public.

7. Any television broadcast station operating on a Shared Use channel under the provisions of §73.603(b) will be charged a User Fee no greater than the highest charged for any Shared Use Channel license.

DISCUSSION
KYES IS A SMALL BUSINESS

KYES got on the air with less than $150,000 in capital. All financial efficiencies were used. A combination of modern technology, judicious application of used equipment, an inexpensive transmitter location where relatively low power could reach a wide area, and countless hours of sweat equity made KYES possible. A truly "Full Service Independent" station was crafted to work in a

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[7] This regulation specifies how to account for organization structure, combinations of entities, etc.

[8] At present that equals $700,000 gross receipts annually for TV.

[9] See Report and Order in MM Docket No. 92-259 Implementation of the Cable Television Consumer Protection Act of 1992, 8 FCC Rcd. 2965, 2973, Para. 28 (1993).

market where such an attempt would otherwise be bound to fail.[10] The stations schedule includes local news, children programming, and informational segments. (See attached schedule.)

Conventional logic says that in a such a small market as Anchorage, a conventional independent station such as KYES cannot be expected to succeed. Yet, with cost controls few in Washington D.C. could imagine, it may survive.

The station grossed under $180,000 in the last year for which we have data, 1992. It just now has 5 full time employees. Yet it operates 24 hours a day, year in and year out. The user fee is significant to such a lean operation, if paid could cause cessation of operations (for example, skipping payroll),and certainly will lengthen elapsed time before break even as well as significantly reduce service the station can provide the public.

TELEVISION SIGNALS ARE SPARSE IN ALASKA

In Alaska, economics limit the number of stations, not spectrum scarcity. Anyone wanting a TV station can have one. If this user fee is applied as proposed, the economic barrier to new entry in Alaska will raise even higher, unnaturally inhibiting the number of stations from which viewers can choose.

Television regulations in California and Alaska are

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[10] For example, the station uses SVHS tape costing about $3.00 per hour. The 1.3 KW transmitter electricity cost is about $180 per month. The output is fed into an antenna array costing under $3,000, not including the owners labor.

identical,[11] so we can compare the two states to discover the number of stations that citizens of Alaska could receive if economics didn't limit the number of stations. In other words, the spectrum itself can support the same number of stations per square mile in both states.

In addition, Los Angeles and Anchorage are similar, except for the number of residents. Both communities are spread out over a large area. The political boundaries of Los Angeles comprises an area of 465 square miles. Anchorage is larger, with 1,732. A large fraction of both markets viewers reside outside of an 80 mile radius from the city (the maximum grade B service range of a TV station). The distance over which viewers watch Los Angeles or Anchorage stations extends over 120 miles from the city core.[12]

**COMPARING ALASKA AND CALIFORNIA
IN TERMS OF EQUITABLE DISTRIBUTION OF TV STATIONS
47 U.S.C. SECTION 307(b) ISSUE**

In Alaska, most TV spectrum is not occupied. The total number of TV allotments in California is for 137 stations. In Alaska it is 25. The area of California is 158,706 sq. miles, that of Alaska is 591,000 sq. miles. The number of square miles per allotment in California is 1,158, in Alaska it is 23,640. By this

[11] Milage spacing, ERP limits, all allocation rules (except, of course, the Table of Allotments), all technical rules are the same in both states. If one state has fewer stations per square miles that can be considered "under loading" of the spectrum.

[12] See A.C. Nielsen DMA definitions and Audience Allocation Report.

comparison the spectrum "loading" in Alaska is at 5% of capacity.[13]

Minimum separation between co-channel VHF band stations is 189.5 miles, UHF band is 174.5 miles. These distances are defined as "coordinating distances" since a station within that distance will preclude another on at least one or more channels.

Counting all allotments in the TV spectrum, including TV land mobile reservations, operating stations, and unused allotments within the reference co-ordinates of Los Angeles and then the reference co-ordinates of Anchorage, we find 111 "uses" of TV spectrum within the coordinating distance of Los Angeles and 9 in Anchorage.[14] Assuming Los Angeles is near 100% channel loading, by this measure, Anchorage has 8% TV channel loading.

Television stations operating at maximum facilities in both cities have a grade B signal out to 80 miles. Within 80 miles of Anchorage there are 8 full service stations, in Los Angeles there are 52. In other words, a viewer in downtown LA has a far greater choice of stations. Yet, as we have shown above, the spectrum could support an equal number of stations in Anchorage.

Since FCC regulation is the same in Anchorage and Los Angeles, it is clear 44 more TV stations could be built in the Anchorage area. The only reason residents of Anchorage don't have those 52

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[13] This does not take into account the large number of California TV channels that have been removed from TV service. No channels in Alaska have been removed from TV service.

[14] This synopsis results from a study of the FCC engineering TV database for the end of December 1993.

signals to choose from is that Anchorage doesn't offer the financial base upon which to build and operate so many stations. The user fee can only reduce the broadcast services available to Alaskans.

THE CONSTITUTIONAL EQUAL PRIVILEGE AND IMMUNITY ISSUE

The number of commercial TV stations delivering a grade A signal to Los Angeles is 17.[15] The number in Anchorage is 6. The number of DMA households in Los Angeles is 6,560,840. In Anchorage the number of DMA households is 117,000.[16] Dividing the number of households by stations we get:

ANCHORAGE:	19,500	HH Per station
LOS ANGELES:	385,931	HH Per station

Dividing the number of households by an $18,000 Los Angeles, and an Anchorage $5,000 fee we get:

ANCHORAGE:	$ 0.256	Per household per station per year.
LOS ANGELES:	0.046	Per household per station per year.

The disadvantage to Anchorage residents is clear. Alaskans will pay 550% (in this comparison) what Los Angelinos pay per grade A signal delivered.

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[15] We used the 1990 TV Factbook and personal knowledge of contours to estimate the actual number of signals in Los Angeles. In Anchorage, it was easy.

[16] Data from 1990 TV Factbook, 1987-88 Nielsen DMA audience Allocation Report. Commentator knows this is not the most recent data, but, remember it is a small business and cannot afford to update frequently.

THE COMMISSION IS PERMITTED TO GRANT WAIVERS AND EXCEPTIONS

Pub. Law No. 106-66, Title IV, 13 107-392 (12) (d) (iv) is directed toward the process of competitive bidding for spectrum, but states "Small business, rural telephone companies, and business owned by minority groups and women (must be)... able to participate successfully in the comparative bidding process. Pub. Law No. 103-66, Title IV, 6002(a) 397 states the fees assessed shall..."take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commissions activities." Section 9(11)(d) of the 1994 Regulatory Fees Act states that waiver of the fee are permitted. 47 U.S.C. §307(b) requires the Commission to provide for a fair, efficient and equitable distribution of radio service. Congress has clearly expressed terms under which waiver of fees can be found to be desirable.

KYES DOES NOT OPERATE ON AN EXCLUSIVE USE CHANNEL

KYES operates on a non-exclusive use channel. As made clear in 47 C.F.R. §73.603(b), KYES must accept interference from other non-government fixed operations on the channel.[17] Therefore, the law compels the FCC to treat KYES to a different fee structure than stations operating on exclusive use channels.[18]

These laws should provide adequate foundation for the relief

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[17] We have been told there are some government facilities in the nearby Kenai-Peninsula area as well, but government lists are not available to KYES.

[18] Although the statute defines "mass media" as an exclusive use, it is clear that KYES operates on a "shared use channel". As can be seen from the schedule of fees, shared use channels are charged much less. See NPRM, Appendix A.

requested herein.

Therefore, for the reasons set forth above, Commentor respectfully requests the Commission adopt regulations less harsh for small entities, as suggested on page 2 of the forgoing.

Submitted this 18th day of April by Jeremy Lansman, President, Fireweed Communications Corporation.

Respectfully submitted,

Jeremy Lansman, President
FIREWEED COMMUNICATIONS CORPORATION
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ATTACHMENT A

It may be helpful to use first person to better communicate to you what we are saying.

1. I called the only TV station in Sitka, soon after reading about the user fees. After locating the person representing himself to be the owner, I sought his opinion about the user fee. He said he had not heard about it; that with the closure of the sawmill it was difficult imagine paying the fee.

2. The managers of KTUU, KTBY, KAKM, KTVA, KIMO, and myself, representing KYES had a meeting last April 9th. The only Full Service station not participating in the meeting was KDMD, the full time home shopping channel. I mentioned this FCC proceeding. None of them were aware of it.

3. The day I heard about this NPRM, April 7th, I mentioned it to the manager of a local FM-FM radio duopoly. He was unaware of this proceeding, or the user fee proposal applicable to him.

4. As it happens, Alaskans must live with the same FCC rules as the lower 48 states. The result is an overburden of regulation that is unwarranted. Most FCC regulation is based upon the notion of spectrum scarcity. Indeed, the spectrum is limited, but here in Alaska it is mostly vacant. In Anchorage, the AM radio dial is empty above 1140. The FM band, though filling up, has room for more stations.[19] As pointed out above, the TV band is even emptier.

[19] Since the Commission liberalized its duopoly rules to permit the ownership of two FM stations in the same radio market, the spectrum is filling up with fewer owners. One new station can be fit into Anchorage, several more could fill suburban slots delivering a signal to Anchorage.

5. The logic of revoking operating authority for non payment may make sense in larger markets, but not here. In Los Angeles, an owner will operate a station up to the last moment until an authorization is finally dead, presumably because there is money to be made, or at least in the slim hope of reversing a revocation order so that the license can be sold for multiple millions.

In Alaska a broadcaster loosing money will have no incentive to go on. The outcome of a revocation would be a dark channel. Why would an operator continue if the permit is essentially worthless and the station operates at a negative cash flow? The outcome? Reduction of service.

As an example of the thin financial ice upon which KYES skates, two of seven Anchorage TV stations have been, or are in receivership or bankruptcy. KTBY, the Fox affiliate recently climbed out of bankruptcy, KIMO, the ABC affiliate is in receivership.

In the last four years KABN, KXDZ, and KEAG radio have been dark. Two still are. In a land of plentiful, there are times one can make more money staying off the air.

The point is, that in Anchorage, with less of a population base, and with less limited spectrum, the financial underpinnings of a station are flimsy compared to larger, or more crowded parts of the United States.

KYES 5 ANCHORAGE

Program Schedule

Winter 1994

Time	Monday – Friday	Saturday	Sunday	Time
06:00am	Hallo Spencer	THE BOX	THE BOX	06:00am
06:30am	Inspector Gadget	U. S. Farm Report	Stone Protectors	06:30am
07:00am	The Adventures of T-Rex	America's Black Forum	Double Dragon	07:00am
07:30am	Captain Planet	Wall Street Journal	Mighty Max	07:30am
08:00am	Yogi & Friends	Gold Prospecting	Speed Racer	08:00am
08:30am	Mr. Bogus		Funtastic World of Hanna Barbera	08:30am
09:00am	Joan Rivers: Can We Shop?	Newsworthy		09:00am
09:30am		Paid		09:30am
10:00am	KYES MORNING MOVIE	KYES SAT. MORNING MOVIE		10:00am
10:30am			Biker Mice from Mars	10:30am
11:00am			Transformers II	11:00am
11:30am			Exo Squad	11:30am
12:00pm	The Maury Povich Show	Martha Stewart	Tour of Homes	12:00pm
12:30pm		Working Woman	Varied	12:30pm
01:00pm	The Montel Williams Show	KYES SAT. AFTERNOON MOVIE	WCW Wrestling	01:00pm
01:30pm				01:30pm
02:00pm	Varied		Monster Wars	02:00pm
02:30pm				02:30pm
03:00pm	XuXa	California Dreams	Babe Winkleman	03:00pm
03:30pm	Bots Master	Energy Express	Outdoorsman	03:30pm
04:00pm	DuckTales	Family Matters	American Adventurer	04:00pm
04:30pm	TaleSpin	Only in Hollywood	Video Car Lot	04:30pm
05:00pm	Sonic the Hedgehog	Siskel & Ebert	Wall Street Journal	05:00pm
05:30pm	Pink Panther	Travel Update	It's Your Business	05:30pm
06:00pm	Family Matters	Home Video of the Stars	Spirit of AK/Court TV	06:00pm
06:30pm	Taxi	Court TV	Valley News	06:30pm
07:00pm	The Montel Williams Show	*Time Trax*	ACTION PACK MOVIE	07:00pm
07:30pm				07:30pm
08:00pm	Monday: KYES EVENING MOVIE Tuesday: KYES EVENING MOVIE Wednesday: *Babylon 5* Thursday: ACTION PACK MOVIE Friday: KYES EVENING MOVIE	*Babylon 5*		08:00pm
08:30pm				08:30pm
09:00pm	Wednesday: *Kung Fu: The Legend Continues*	*Kung Fu: The Legend Continues*	*Time Trax*	09:00pm
09:30pm				09:30pm
10:00pm	Taxi	KYES SAT. LATE MOVIE	National News	10:00pm
10:30pm	CNN Headline News		Dr. Jack Van Impe	10:30pm
11:00pm	KYES LATE MOVIE Friday: THRILLER & CHILLER THEATRE		Jerusalem On Line	11:00pm
11:30pm			Latin Beat	11:30pm
12:00pm		Billy Bob's Country Countdown	Uptown Comedy Club	12:00pm
12:30pm				12:30pm
01:00am	THE BOX	THE BOX	THE BOX	01:00am

KYES can also be seen on cable channel 5.

YES! Club for Kids, with Eddie P, airs during cartoons.

ALASKA UNUSED UN-APPLIED FOR ALLOTMENTS

CHAN	CITY	STATE	STATUS	EDORCOM	COMMENT
2	DILLINGHAM	AK		E	
2	KETCHIKAN	AK		C	
3	SEWARD	AK		C	
4	KETCHIKAN	AK		C	
7	FAIRBANKS	AK		C	
9	ANCHORAGE	AK		E	EFFECTIVE 1-31-91
9	KETCHIKAN	AK		E	
10	DILLINGHAM	AK		C	
10	JUNEAU	AK		C	
13	FAIRBANKS	AK		C	

CALIFORNIA UNUSED UNAPPLIED FOR ALLOTMENTS

CHAN	CITY	STATE	STATUS	EDORCOM	COMMENT
11	WILLITS	CA		C	EFFECTIVE 1-4-88, SI
13	ALTURAS	CA		C	
14	BISHOP	CA		E	
14	SUSANVILLE	CA		E	
15	SAN LUIS OBISPO	CA		E	
20	BISHOP	CA		C	EFFECTIVE 6-8-87.
20	YREKA CITY	CA		E	
22	BLYTHE	CA		E	
25	RIDGECREST	CA		E	
26	BRAWLEY	CA		E	
27	COALINGA	CA		C	
28	OROVILLE	CA		C	
32	SANTA BARBARA	CA		E	
35	BARSTOW	CA		E	
39	BAKERSFIELD	CA		E	
41	YOSEMITE VALLEY	CA		C	EFFECTIVE 5-16-88.
46	CHICO	CA		E	EFFECTIVE 3-19-90.
55	SANTA BARBARA	CA		E	EFFECTIVE 11-23-87.
56	SALINAS-MONTEREY	CA		E	
62	SANTA ROSA	CA		E	
65	BAKERSFIELD	CA	frozen	C	